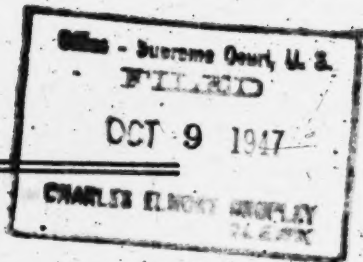


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IN THE
Supreme Court of the United States
October Term, 1947.

No. 49.

WILLIAM SHAPIRO,
Petitioner,
AGAINST
UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

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No. 49

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
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BRIEF FOR PETITIONER.

Opinion Below.

The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 159 F. 2d, 890 (R. 122-127). There was no opinion in the District Court for the Southern District of New York.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, U. S. C., Sec. 374a), and as modified pursuant to the Act of March 8, 1934 (18 U. S. C., Sec. 688), by Rule XI of the Rules of Practice and

Procedure after verdict in criminal cases (292 U. S. 661, 666).

The judgment of the Circuit Court of Appeals was entered on February 7th, 1947 (R. 128). The petition for writ of certiorari was filed on March 5th, 1947. The Government did not oppose the granting of certiorari as the question involved, "is an important one" which "has not been, but should be, definitely decided by this Court". (Government's Memorandum p. 3). Certiorari was granted on June 2nd, 1947 (R. 128).

Questions Presented.

The questions presented are as follows:

1. Was the petitioner, who properly claimed immunity, entitled to immunity by virtue of Section 202 (g) of the Emergency Price Control Act of 1942 (50 U. S. C. A. App. 922 [g]) when he produced, pursuant to a subpoena of the Price Control Administrator, books and records required to be kept pursuant to Section 202 (b) of said Act?

2. Where the Price Control Administrator, by regulation, requires an individual to keep records "of the same kind as he has customarily kept", do such records become "public records" which are not entitled to the immunity granted by Section 202 (g) of the Emergency Price Control Act and the Fifth Amendment?

3. Are the provisions of Section 202 (g) of the Emergency Price Control Act and the regulations issued pursuant thereto violative of the Fifth Amendment in that the protection afforded thereby is not as broad as that of the Fifth Amendment?

Statutes and Regulations Involved.

The petitioner was prosecuted for violation of the Emergency Price Control Act (50 U. S. C. A. App. Section 901). Section 202 (b) thereof (50 U. S. C. A. App. 922 [b]) provides:

"The administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defence-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place."

Subsection (g) of said section provides:

"No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege."

The Compulsory Testimony Act of February 11th, 1893 (49 U. S. C. A. 46), provides:

4

"Self-criminating testimony; perjury, refusal to testify. No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the preceding chapter on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: Provided, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than \$100 nor more than \$5,000, or by imprisonment for not more than one year or by both such fine and imprisonment."

Pursuant to the authority granted by Section 202 (b) of the Emergency Price Control Act, the Administrator

issued the following regulations (Maximum Price Regulation No. 426):

"Sec. 1439.3. Article 2. Section 14. Records.

(a) Every person subject to this regulation shall, so long as the Emergency Price Control Act of 1942, as amended, remains in effect, preserve for examination by the Office of Price Administration all his records, including invoices, sales tickets, cash receipts or other written evidences of sale or delivery which relate to the prices charged pursuant to the provisions of this regulation.

(b) Every person subject to this regulation shall keep and make available for examination by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, records of the same kind as he has customarily kept, relating to the prices which he charges for fresh fruits and vegetables after the effective date of this regulation; and in addition as precisely as possible, the basis upon which he determined maximum prices for these commodities."

Statement.

The petitioner is a wholesaler of fruit and produce (R. 63). On or about September 29th, 1944, more than two months prior to the filing of the information upon which the petitioner was convicted, he was served with a subpoena *Duces Tecum* and *Ad Testificandum*, issued by the Administrator of Price Control. The subpoena directed him to appear before the Chief Enforcement Attorney for the Office of Price Administration on October 2nd, 1944 to testify concerning

"all purchases and sales of fresh fruit and vegetables from Sept. 1, 1944 to Sept. 28, 1944,"

and to produce at that time

"all duplicate sales invoices, sales books, ledgers, inventory records, contracts and records relating to the sale of all commodities from Sept. 1, 1944 to Sept. 28, 1944" (R. 35).

The hearing in connection with the subpoena was adjourned to October 4th, 1944. On that day, petitioner appeared at the office of the Enforcement Attorney. After being sworn, he was asked by the Enforcement Attorney to produce his books and records pursuant to the subpoena *Duces Tecum*. The attorney for the petitioner before any books were turned over, asked a question and received a reply from the Enforcement Attorney, as follows:

"Mr. Siskind: Is the witness being granted immunity as to any and all matters or information obtained as a result of the investigation and examination of these records?

Mr. Greif: The witness is entitled to whatever immunity which flows as a matter of law from the production of these books and records which are required to be kept pursuant to MPRs 271 and 426.

Mr. Siskind: Under those circumstances I believe that Mr. Shapiro would like to make a statement for the record" (R. 37).

The petitioner then made this statement on the record:

"I wish to note that I am appearing here as an unwilling witness pursuant to subpoena served upon me and that I claim my constitutional privilege. I do not waive immunity and specifically claim immunity under the provisions of the Emergency Price

Control Act of January 30, 1942, and particularly United States Code, Title 50, Section 922, as well as under the Compulsory Testimony Act of February 11, 1893 (United States Code 1934, Title 49, Section 46) and under the Constitution or any other applicable statute or provision or section of the United States Code or otherwise, as to any and all records produced or testimony given throughout this inquiry or investigation or any proceeding arising thereunder. Upon these conditions I have produced the records and documents called for in your subpoena addressed to me and dated September 28, 1944" (R. 37).

Thereafter there was filed against the petitioner an information, consisting of 48 counts, charging him with violating the price control regulations by engaging in tying-in agreements (R. 2-31). The leads which resulted in the obtaining of the information were developed from the books produced by the petitioner in obedience to the subpoena issued by the Price Control Administrator (R. 123).

Prior to the trial the petitioner moved on March 13th, 1945, by a plea in bar, for the dismissal of the information on the ground that he had obtained immunity (R. 31-39).

The motion was denied on April 17th, 1945 for reasons stated by United States District Judge Coxe in a memorandum in three cases against *Joseph Justman, et al.*, decided at about the same time (R. 40). The gist of that decision was that no immunity attaches to books and records required to be kept by the provisions of the Emergency Price Control Act.

The petitioner renewed such motion upon the trial at the conclusion of the Government's case (R. 55). The Trial Judge refused to review Judge Coxe's decision, denied the motion and granted an exception (R. 55).

The petitioner was found not guilty on all counts of the information submitted to the jury except Counts 7, 8, 9, 10 and 11, dealing with sales to one D'Avino (R. 91-92).

After the verdict the petitioner moved to set aside the verdict as being against the weight of evidence and contrary to law. This motion was denied and an exception taken (R. 93). He further moved in arrest of judgment and for a new trial (R. 106-109), which motion was also denied (R. 114).

The sentence imposed by the Trial Court upon the petitioner was a fine of \$5,000.00 (R. 114).

The conviction was unanimously affirmed on appeal by the Circuit Court of Appeals for the Second Circuit (R. 122-127).

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred in holding that:

1. Section 202 (g) of the Emergency Price Control Act did not require, and Congress did not intend, that immunity be extended to an individual producing, pursuant to subpoena, records required by said Act to be kept by him (R. 122-127).

2. The petitioner's records were "public records" to which immunity did not attach (R. 125).

3. The statutory immunity of Section 202 (g) of the Emergency Price Control Act extends only to oral testimony and documents subpoenaed by the Administrator of Price Control which were not required by said Act to be kept (R. 126).

4. Section 202 (g) of the Emergency Price Control Act, and the regulations issued pursuant thereto, as inter-

preted by the Circuit Court of Appeals, affords a protection as broad as that of the Fifth Amendment to the Constitution (R. 125).

5. The granting of immunity to the petitioner would destroy the value of the record keeping requirements of the Emergency Price Control Act (R. 127).

POINT I.

The express provisions of Section 202 (g) of the Emergency Price Control Act and the clear intent of Congress require the granting of the immunity claimed by the petitioner.

The Emergency Price Control Act

Section 202 of the Emergency Price Control Act is clear and unambiguous. Subsection (b) thereof endows the Administrator of the Office of Price Administration with extensive authority to command the production of books and records. The exercise of such power, however, is limited by the provisions of subsection (g) which grants "to any individual who specifically claims such privilege" the broad immunity of the Compulsory Testimony Act of February 11, 1893.* This immunity is extended to any person "complying with any requirements under this section"...

The immunity attending compliance "with any requirements" of Section 202 necessarily includes the production, pursuant to subpoena, of records required to be kept by the Administrator in accordance with regulations issued under the authority of said section.

*It is undisputed that the petitioner properly claimed any privilege which accrues to him under the Emergency Price Control Act.

**Italics supplied throughout.

The Congressional Intent

If there be doubt as to the all inclusive nature of the immunity granted by Section 202 of the Emergency Price Control Act, such doubt is resolved by the report of the Senate Committee on Banking and Currency submitted to accompany the Emergency Price Control Act (H. R. #5990) and being Senate Report No. 931 of the year 1942, which states as follows (at p. 21):

“Section 202 (a) authorizes the administrator to make studies and investigations and to obtain the economic and other data necessary or proper in prescribing maximum price, rent, and other regulations and orders, and in the administration and enforcement of such regulations and orders and of the provisions of the bill. This authority may be enforced through the usual forms of compulsory process and the power to inspect and copy documents, inspect inventories and defense-area housing accommodations. The power to require by regulation or order keeping of records and the making of reports is also granted by *this subsection*.”

The foregoing statement is followed immediately by the statement:

“Although, no person is excused from complying with *any requirement of this subsection*, because of his privilege against self-incrimination, the immunity provisions of the Compulsory Testimony Act of February 11, 1893, are made applicable with respect to any individual who specifically claims such privileges.”

It is obvious both from the general context of the foregoing quotation and the repetition of the words “*this sub-*”

section" in both paragraphs thereof that the immunity provision was to apply to records required to be kept under the Emergency Price Control Act.

The Emergency Price Control Act and the Report of the Senate Committee on Banking and Currency indicate that Congress was desirous of granting to the Administrator power to "obtain the economic and other data necessary or proper in prescribing maximum price, rent and other regulations and orders". This power included the right to compel the keeping of records and the making of reports. By recourse to the records of a particular industry, price schedules and regulations could be formulated for such industry. Such records were likewise meant to be and were of substantial assistance in the civil enforcement of the Emergency Price Control Act. The civil penalties attendant upon a violation of such Act were severe. The criminal enforcement of the Act, however, was not, in the eyes of Congress, of such importance as to eliminate the Constitutional safeguards attending the compelled production by subpoena of an individual's records. It therefore specifically incorporated in the Emergency Price Control Act the broad immunity provisions of Section 202 (g).

The Case Law

This Court has never passed upon the questions presented by the case at bar. For this reason and the fact that the cases in the lower courts have expressed conflicting opinions, the Government did not oppose the granting of certiorari.

The assumption by the Circuit Court of Appeals that Congress "intended" to limit immunity where the records involved were kept pursuant to the order of the Administrator, finds, as we have seen, no basis either in the Emergency Price Control Act itself or in its legislative history. Congress could have spelled out such exception had it so

intended. It did not do so. As stated by the District Court of the District of Columbia, in *In Re Hoffman*, 68 F. Supp. 53 (D. C. District of Columbia), now on review in this Court:

"To read into the statute the qualification which the Administrator would have this Court insert into the Act would practically be to amend an Act of Congress by judicial construction. The Act as it stands is unambiguous and unequivocal as well as comprehensive. An insertion of the restriction would, in effect, be an amendment of the Act."

The *Hoffman* case involved a criminal proceeding to punish the respondent for contempt of court in violating an injunction.

In *Porter v. Wright, et al.*, 69 F. Supp. 46 (D. C. Oregon), McCulloch, D. J., in a supplemental opinion rendered December 6th, 1946, expressed his agreement with the decision in *In Re Hoffman, supra*, and assailed the effort made by administrative boards to weaken constitutional rights previously held unassailable, as follows, at page 47:

"From Justice Holtzoff's opinion and from arguments that have been made in this court, I understand that OPA relies on the 'Public Records' or 'Quasi-Public Records' doctrine, which has swept the Circuit Courts of Appeal, but so far has not been accepted in the Supreme Court. *Davis v. United States*, 66 S. Ct. 1256. The argument is, that as to a record required to be kept by statute or administrative regulation, there can be no claim of privilege against self-incrimination. This, despite the fact that the Price Control Act concedes the right. 50 U. S. C. Appendix, Sec. 922 (g), 50 U. S. C. A. Appendix, Sec. 922 (g)."

In *Phelps v. United States*, 160 F. 2d, 858 (C. C. A. 8th), decided April 3, 1947, Riddick, C. J., in the dissenting opinion, stated as follows:

"If, as appellant Peters asserts, he specifically claimed the exemption provided by the Act of February 11, 1893, we may not deny his claim of immunity from prosecution because he was not sworn or because of the 'required records doctrine', unless we read into the Act something that Congress declined to put in it."

In *Spevak v. United States*, 158 F. 2d 594 (C. C. A. 4th), decided December 6, 1946, Parker, C. J., in a unanimous opinion of that Court, considered the immunity provision of the Emergency Price Control Act. The appellant appealing from his conviction claimed that certain evidence consisting of photostatic copies of invoices were improperly admitted at the trial. The Court held that such evidence was admissible as the invoices were voluntarily furnished. It indicated, however, that had the privilege against self-incrimination been claimed, the result may well have been different, when it stated at page 597:

"We think it perfectly clear that since appellants were not required to produce the invoices under subpoena or otherwise, but furnished them voluntarily to officials of the government without claiming the privilege against self-incrimination as provided by the statute, there is nothing in the law which forbids their being received as evidence."

The divergent view which regards "with disfavor the constitutional privilege against self-incrimination", is

*See concurring opinion of Judge Frank in *U. S. v. Davis*, 151 F. 2d 140, 144; affirmed 328 U. S. 582.

expressed, by way of dictum, in the cases cited by the Circuit Court of Appeals in support of its decision. These cases are distinguishable on the facts. For the most part they were cases where the defendants had waived their rights to immunity by voluntarily allowing the full inspection of their records by inspectors of the Office of Price Administration,* or cases, brought to recover treble damages, which were held to be civil in nature and, therefore, did not directly involve the question of immunity.**

In *Rogers v. United States*, 138 F. 2d 992 (C. C. A. 6th), also cited by the Circuit Court of Appeals, there was involved a provision of the Agricultural Adjustment Act which required the filing of certain reports.*** The Act contained no immunity provision. The prosecution was for the failure to file the report required for the purpose of computing subsidy payments to farmers. In the instant case, not only is there a specific immunity provision contained in the Emergency Price Control Act, but the records involved were not records which were required to be filed thereunder.

The Reasoning of the Circuit Court of Appeals

The Circuit Court of Appeals argued that Congress never intended to grant immunity which "would destroy the value of the record-keeping requirements—which are unquestionably valid, *United States v. Sullivan*, 274 U. S. 259,—by making their use dependent upon the waiver of suspected wrong-doers of the privilege against self-incrimination" (R. 127). We submit no such result would follow the granting of immunity to the petitioner. The

**Bowles v. Bentrice Creamery Co.* (C. C. A. 10th) 146 F. 2d 774; *Bowles v. Glick Bros. Lumber Co.* (C. C. A. 9th) 146 F. 2d 546; *Bowles v. Stitzinger* (D. C.) 59 F. Supp. 94; *Bowles v. Kirk* (D. C.) 59 F. Supp. 97.

***Amato v. Porter* (C. C. A. 10th) 157 F. 2d 719; *Bowles v. Chew* (D. C.) 53 F. Supp. 787; *Bowles v. Seitz* (D. C.) 62 F. Supp. 773; *Bowles v. Miele* (D. C.) 64 F. Supp. 835.

***The filing of specific reports presents a different situation more fully considered in Point B *infra*.

record-keeping requirements would still be of inestimable value in enforcing the severe civil penalties of the Emergency Price Control Act and in criminal prosecutions against persons other than the witness. Concededly criminal prosecutions against the witness would be rendered more difficult if the witness, a suspected wrongdoer, refused to waive immunity. But such has always been the case where ~~an individual has relied on his constitutional privilege against self-incrimination.~~ The grant of such privilege, however, does not of necessity mean that the suspected wrong-doer would go unpunished. As the Circuit Court of Appeals stated in its opinion, the Administrator in the case at bar obtained the names of the petitioner's customers from the books examined by its enforcement agents and ascertained that one of such customers was prepared to testify against the petitioner (R. 123).^{*} If upon the petitioner's claim of immunity the enforcement agents had refused to use the petitioner's books, he could nevertheless have been prosecuted upon the testimony of his customers. As the United States Attorney aptly pointed out in his brief in the Circuit Court of Appeals, the Government "could with great ease have interviewed customers as they left the appellant's place of business".

It is likewise erroneous to argue, as the Circuit Court of Appeals did, that Congress could not have intended to grant immunity to the petitioner because the immunity granted him must be "coterminous with what otherwise would have been the privilege of the person concerned" (*Heike v. United States*, 227 U. S. 131, 142). In the *Heike* case corporate records were involved. Corporate records since the decision in *Wilson v. U. S.*, 221 U. S. 361, 380, have been deemed excluded from the protection of the

^{*}It is not essential that the Government should have received this information from these sources. It is sufficient that the Government may have. This has been the law since at least the time of the decision of Chief Justice John Marshall in the famous *Aaron Burr* case (1 *Burr's Trial*, p. 244).

privilege against self-incrimination." We do not argue that the production of corporate records would entitle a person to immunity under the Emergency Price Control Act. We do contend, however, that an individual's records are entitled to such immunity whether or not the Emergency Price Control Act be determined to grant immunity coterminous with the constitutional privilege or whether such immunity be determined to be broader than such constitutional privilege. (*United States v. Monia*, 317 U. S. 424.) An individual's records have always been entitled to immunity under the Constitution and the Compulsory Testimony Act. And if there be any doubt as to the right thereto, the Emergency Price Control Act in specific terms states that an individual "complying with any requirements" under Section 202 is entitled to such immunity—which immunity is granted to him whether the records produced by him be denominated "public records" or not.

This is a case of first impression in this Court. The decisions of the lower Federal Courts are in conflict. It is, therefore, necessary to consider *de novo* not only the specific provisions of the statute involved and regulations issued pursuant thereto, but also the far-reaching effect of the acceptance of the Government's position (See Point II, *infra*). Disregarding for the moment, however, the disastrous effect upon the basic indispensable privileges of our democratic system of Government which would result from the unlimited extension of the public records doctrine, and the question of whether or not petitioner's records were actually public records, the fact, nevertheless, is that the immunity claimed by the petitioner was granted to him by the specific provisions of Section 202 (g) of the Emergency Price Control Act.

POINT II.

To deny the petitioner immunity because the documents produced by him were required to be kept by the Administrator would render Section 202 (g) of the Emergency Price Control Act meaningless and violative of the Fifth Amendment to the Constitution.

Section 1439.3, Article 2, Section 14 (a) of Maximum Price Regulation 426, issued by the Administrator pursuant to the authority of Section 202 of the Emergency Price Control Act, requires a person subject thereto to keep and make available for examination "*all his records including*" certain specified records. Section 14 (b) thereof requires him to keep "*records of the same kind as he has customarily kept*".

The sweeping nature of this regulation is self-evident. It is one thing to hold that administrative requirements that *specific* transactions be recorded, or that particular reports be filed, serve to make such records and reports public records. When, however, the only requirement is that an individual keep the same records as he customarily kept, such records cannot possibly be held to be public records. They are personal in nature. They involve his ordinary, every-day business, and every detail thereof. All business records have some bearing on prices charged. In fact under certain regulations, prices are determined from records made prior to the enactment of the Emergency Price Control Act which were certainly at that time private records.* To hold such records to be public records would destroy completely the immunity attaching to the production of an individual's private records. For all private records would become public records upon the issuance by an administrative officer of a directive requir-

*See *In re Hoffman, supra*, where the regulations provided for the keeping of records "in regard to every used car he has acquired" which obviously referred to used cars acquired before the enactment of the Emergency Price Control Act.

ing an individual to keep all records previously kept by him.

The public records doctrine is founded upon a dictum of this Court in *Wilson v. United States*, 221 U. S. 361. The decision in that case was that a corporate officer may be required to produce corporate books. Nothing more was involved. In its opinion the Court observed that the mere physical custody of incriminating documents does not protect the custodian against their production. Accordingly, public records, official documents kept in the administration of public office, and "records required by law to be kept in order that there may be suitable information of transactions which are the purported subject of governmental regulation", must be produced.

Originally this doctrine was confined to druggists' records of prescriptions or of the sale of poisons or intoxicating liquors; to physicians' reports of deaths and their causes; to reports of accidental injuries in factories; to motorists' reports of accidents; and to other transactions made subject to statutory regulations, relating to the keeping of specific records in respect of conduct regarded as peculiarly subject to State control. In recent years the doctrine has been extended by the lower Federal Courts, usually by way of dictum, to all records kept pursuant to administrative regulation.* We submit that the dictum of this Court in *Wilson v. United States*, *supra*, was never meant to permit all records to become public records at the will of an administrative officer. The distinction between public and private records is implicit in the discussion contained in Wigmore on Evidence (Vol. VIII, Sec. 2259c):

"Sec. 2259c. *Crime disclosed in (1) Public Books, or (2) Books Required by Law to be Kept.* 1. Public

*Compare *U. S. v. Murdock*, 284 U. S. 141, *Internal Revenue Agent v. Sullivan*, 287 Fed. 138 and *Steinberg v. United States*, 14 F. (2d) 564, 568. The Internal Revenue Regulations require taxpayers to keep books and records (Regulation 111, Secs. 29, 54-1). No suggestion was advanced in these cases that the regulations converted the defendant's private books and records into public records and deprived him of his privilege against self-incrimination.

official books, being the property of the State, are always accessible to its representatives and usually to the public. . . .

2. The same reasoning applies to records *required by law to be kept* by a citizen not being a public official, e.g. a druggist's report of liquor sales, or a pawn-broker's record of pledges. The only difference here is that the duty arises not from the person's general official status, but from the specific statute limited to a particular class of acts."

The public records doctrine as stated in the *Wilson* case was in substance that the acceptance of a license to conduct a particular business pursuant to a statute requiring the keeping of certain records, constitutes, in effect, the voluntary waiver of the privilege against self-incrimination. We submit that the Emergency Price Control Act does not in any sense confer upon those subject thereto a privilege in exchange for which their Constitutional privilege is waived. If the limited doctrine of the *Wilson* case is to be broadly applied to any area of permissible governmental control, the constitutional privilege of self-incrimination becomes solely subject to the will of Congress. There is no field of legislative regulation which may not involve the keeping of records. The Emergency Price Control Act itself, and the thousands of complex regulations issued thereunder, regulated virtually every field of endeavor.

This Court should not ascribe to Congress an intent to have Section 202 (g) of the Emergency Price Control Act become meaningless. Yet such is the effect of the decision below. The Circuit Court of Appeals in attempting to give some meaning to Section 202 (g) of the Emergency Price Control Act argues that the immunity would apply "to oral testimony given in hearings and investigations conducted by the Administrator" and to the production of documents which the Administrator had subpoenaed but

which he had not required to be kept (R. 126). It is difficult to conceive of any document falling in the latter category when all records "customarily kept" must continue to be kept. Actually the holding of the Circuit Court of Appeals deprives an individual of all immunity with respect to documentary evidence. It matters not that such individual might have immunity with respect to his oral testimony. Section 202 (g) of the Emergency Price Control Act was never meant to limit immunity to oral testimony. The Administrator under said section may not only compel a person to appear and testify but also "to appear and produce documents". And the provisions of the Compulsory Testimony Act incorporated into the Emergency Price Control Act specifically excludes the prosecution of a person "for or on account of any transaction which he may testify, or produce evidence, documentary or otherwise, * * *". Furthermore, oral testimony would rarely have to be resorted to by the Government if all the records of an individual became public records, which he could be compelled to produce without being granted immunity.

As stated by the Government in its memorandum submitted in connection with the petitioner's application for a writ of certiorari, the question in the case at bar "is an important one which affects not only the Emergency Price Control Act but many other Federal regulatory statutes which confer upon administrative agencies power to require and to subpoena records,* and which incorporated by reference or by terminology the immunity provisions of the Compulsory Testimony Act of 1893". An affirmation of the decision below will be construed by the Government as a "green light" permitting it to proceed by sweep

* Among these are Securities Exchange Act of 1934, 15 U. S. C. Secs. 78q, 78u (d); National Labor Relations Act, 29 U. S. C. A. Secs. 156, 161; Public Utility Holding Company Act of 1935, 15 U. S. C. A. Secs. 790(c), 79r(c), 79r(e); Federal Power Act, 16 U. S. C. A. Secs. 825a, 825f(g); Civil Aeronautics Act of 1938, 49 U. S. C. A. Secs. 425(a), 644; Fair Labor Standards Act of 1938, 29 U. S. C. A. Secs. 209, 211, 49 U. S. C. A. Secs. 49, 50; Second War Powers Act of 1942, 50 U. S. C. A. App. Secs. 633(3), 633(4).

ing regulations (such as are involved in the case at bar) to convert all private records into public records. The Government has requested a "go ahead signal", whereby it will be permitted to by-pass an individual's constitutional rights in an effort to simplify its task in criminal prosecutions.

Mr. Justice Murphy in *U. S. v. Jasper White*, 322 U. S. 694, after stating the underlying reasons for the privilege against self-incrimination, stated at page 698:

"The prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law. The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime. While the privilege is subject to abuse and misuse, it is firmly imbedded in our constitutional and legal frameworks as a bulwark against iniquitous methods of prosecution."

The Fifth Amendment and the underlying reasons therefor could be completely and effectually disregarded if the decision below is affirmed. Congress and administrative tribunals could, by requiring the keeping of customary and usual records, bring all records within the scope of the public records doctrine. The books and records of individual business men and farmers would become public property. The privilege against self-incrimination would not exist as to them. In the same category would be the great army of individual taxpayers who are required to keep records properly reflecting their income (Regulation 111, Secs. 29, 54-1). Records which become public records for one purpose could be used to ferret out crimes having no relation to the purposes of the regulatory enactment. To augment "the irksomeness" of governmental regulation by coupling it "with the loss of a fundamental constitutional right would be to build up

popular resistance to needed governmental controls". (See opinion of Judge Frank, *U. S. v. Davis*, 151 F. 2d 140, 144).

Finally, the Emergency Price Control Act and the regulations issued pursuant thereto are constitutional only if they afford a protection as broad as that of the Fifth Amendment (*Counselman v. Hitchcock*, 142 U. S. 547; *Brown v. Walker*, 161 U. S. 591; *Glickstein v. U. S.*, 222 U. S. 139). That would not be the case if their coverage were dependent only upon the will of the administrator. It would not be the case if their effect was to eliminate all documentary evidence from the protection granted by the Fifth Amendment. The Constitution exists as a protection for the citizen against the State. Devices which will have the effect of weakening and in the end nullifying constitutional privileges are always available and readily justified by the exigencies of the moment. A repeal of constitutional protection should not be effected by Congressional legislation or administrative regulation.

CONCLUSION.

The conviction of the petitioner should be reversed and the information dismissed. Petitioner acquired immunity upon producing the records subpoenaed by the Administrator of Price Control and claiming such immunity in accordance with the provisions of the Emergency Price Control Act.

Respectfully submitted,

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